

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**B.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cincinnati, OH, Employer**

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**Docket No. 10-1856  
Issued: July 1, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 7, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated June 9, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant was disabled commencing May 4, 2009 causally related to her accepted employment injury; and (2) whether OWCP abused its discretion by denying authorization for a left knee arthroscopy procedure.

**FACTUAL HISTORY**

Appellant, then a 52-year-old mail handler, filed a Form CA-2 claim for benefits on August 8, 2008, alleging that, due to 22 years of work loading and unloading mail trucks, she

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

developed pain and swelling in her knees and legs. She first became aware of her condition on June 9, 2008.

In an August 8, 2008 form report, Dr. Edmund Schweitzer, Board-certified in orthopedic surgery and appellant's treating physician, advised that appellant required arthroscopic surgery for the hematoma, chronic pain and arthritis in her left knee. In a September 10, 2008 report, he reiterated his recommendation that she undergo arthroscopic surgery, with shaving and lateral release, to ameliorate the patellofemoral arthritis in her left knee.

On January 30, 2009 OWCP accepted the claim for aggravation of bilateral patellofemoral arthritis. It advised appellant that her treating physician was required to explain, with medical rationale, whether the need for surgery was due to the underlying condition of patellofemoral arthritis or the accepted aggravation of the condition.

On May 8, 2009 Dr. Schweitzer again requested authorization for arthroscopic surgery, with shaving and lateral release. He submitted a May 6, 2008 a magnetic resonance imaging scan which found intermediate to high-grade patellofemoral chondromalacia, with medial inflammation. In a September 24, 2008 report, received by OWCP on May 11, 2009 Dr. Schweitzer stated that appellant had patellofemoral arthritis that he believed had been aggravated by her long career with the employing establishment. Regarding medical treatment of her condition, he stated that, while awaiting authorization for surgery, appellant would continue with medication, activity restriction and bracing.

On a May 4, 2009 Dr. Schweitzer stated that appellant was currently experiencing so much pain that she was unable to work. He placed her off work for one month. Dr. Schweitzer again requested authorization for surgery. He noted that heavy work at the employing establishment, including loading trucks and handling 70 pounds at a time, had resulted in appellant's inability to work due to left knee pain, stemming from her accepted condition of aggravation of patellofemoral arthritis. In a report dated May 27, 2009, Dr. Schweitzer stated:

"[Appellant] is unable to work due to pain and swelling in her knee and leg due [to] arthritis of the patellofemoral joint. This arthritis was aggravated by her work injuries and duties and the surgery is direct result of that work casualty. [Appellant] cannot take as aids which further makes no surgical treatment difficult. We are requesting authorization for arthroscopic debridement and lateral release followed by Subparts treatment."

Appellant submitted several CA-7 forms requesting compensation for wage loss commencing May 4, 2009.

By decision dated June 23, 2009, OWCP denied compensation for wage loss as of May 4, 2009, finding that appellant failed to provide rationalized medical evidence supporting that she was totally disabled. It also denied authorization for the requested left knee surgery.

By letter dated July 1, 2009, appellant's attorney requested an oral hearing.

By decision dated September 22, 2009, OWCP's hearing representative set aside the June 23, 2009. She found that Dr. Schweitzer's reports generally supported appellant's total

disability and need for surgery. The hearing representative directed the district Office to contact the employing establishment and request a written statement as to whether appellant provided any medical evidence of work restrictions, and if so, whether a job offer had been given to her; to provide a statement regarding the claim of disability as of May 4, 2009 and whether it could accommodate her work restrictions; for appellant to provide a copy of her left knee treatment notes or diagnostic studies; and to prepare a new statement of accepted facts and refer appellant for a second opinion examination.

By letter dated October 14, 2009, the employing establishment informed OWCP that appellant had been working in a light-duty position since April 12, 2007. Appellant had work restrictions; however, they stemmed from another work injury.

In a report received by OWCP on October 21, 2009, Dr. Schweitzer advised that he performed arthroscopic shave release surgery on appellant's left knee on July 17, 2009. He reported that, during inspection of the knee, the patella showed advanced chondromalacia and a one centimeter subluxation.

OWCP referred appellant for a second opinion examination to Dr. E. Gregory Fisher, Board-certified in orthopedic surgery. In an October 27, 2009 report, Dr. Fisher reviewed the medical history and the statement of accepted facts and provided findings on examination. He indicated that the medical evidence supported that appellant's work-related bilateral aggravation of patellofemoral arthritis was still active, present and had not resolved. The objective findings included decreased range of motion and crepitus over the patellofemoral joint with flexion and extension in both knees and marked decreased strength in the left knee. Dr. Fisher stated that appellant also had subjective findings of tenderness and pain over each knee which corresponded with the objective findings. He advised these residuals were temporary in duration since she was undergoing physical therapy and injections for the left knee since her surgery. Dr. Fisher stated that treatment for the right knee would commence when the left knee condition had resolved.

As to whether the left knee arthritis necessitated surgery, Dr. Fisher stated that the general protocol for treating bilateral aggravation of patellofemoral arthritis, including the Official Disability Guidelines and Millikan Robertson Guidelines, recommended conservative treatment; *e.g.*, medication, injections and active physical therapy for six to eight weeks, before any surgical procedure was indicated. He noted, however, that Dr. Schweitzer's treatment prior to surgery consisted of only a single prescription of a Merlo Deepak and other over-the-counter medications. Dr. Fisher therefore concluded that appellant's left knee arthroscopy was not medically appropriate or necessary.

In a December 9, 2009 supplemental report, Dr. Fisher opined that appellant was not totally disabled from work due to the accepted condition of bilateral aggravation of patellofemoral arthritis. Appellant was able to perform light-duty activities which did not require squatting, kneeling, climbing ladders or stairs and standing or walking more than four hours in an eight-hour day with frequent breaks. Dr. Fisher restricted her from lifting more than 10 pounds while pushing, pulling, carrying and lifting of 10 pounds frequently and 20 pounds occasionally.

By decision dated December 14, 2009, OWCP denied wage loss for disability commencing the period from May 4, 2009, finding that Dr. Fisher's opinion represented the weight of the medical evidence.

By letter dated December 23, 2009, appellant requested an oral hearing, which was held on March 18, 2010.

By decision dated June 9, 2010, OWCP's hearing representative affirmed the December 14, 2009 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>2</sup> has the burden of establishing that the essential elements of his or her claim by the weight of the evidence.<sup>3</sup> Under FECA, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.<sup>4</sup> For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.<sup>5</sup> Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.<sup>6</sup> The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.<sup>7</sup> The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.<sup>8</sup>

Section 8123(a) provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee the Secretary shall appoint a third physician who shall make an examination.<sup>9</sup> It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>4</sup> *See Prince E. Wallace*, 52 ECAB 357 (2001).

<sup>5</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>6</sup> *Gary L. Watling*, 52 ECAB 278 (2001).

<sup>7</sup> *Manual Garcia*, 37 ECAB 767 (1986).

<sup>8</sup> *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>9</sup> *Regina T. Pellecchia*, 53 ECAB 155 (2001).

such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted appellant's claim for aggravation of bilateral patellofemoral arthritis. Appellant continued to work until May 4, 2009, when she asserted that left knee pain stemming from her accepted condition prevented her from performing her work. She subsequently submitted CA-7 forms for the period May 4, 2009 and continuing, claiming that she was totally disabled due to her accepted left knee condition. In support of her claim, appellant submitted several reports and disability slips from Dr. Schweitzer, her attending physician, who requested authorization for surgery to ameliorate this condition. In his treatment note of May 4, 2009, Dr. Schweitzer explained that her accepted condition of aggravation of patellofemoral arthritis required surgery as it had resulted in her inability to work. Initially, he reported that appellant should not work for a one-month period, however, on May 27, 2009 he reported that she was unable to return to work due to pain and swelling in her left leg caused by the accepted condition. Dr. Schweitzer again requested authorization for surgery. Appellant underwent surgery on July 17, 2009. During the surgical procedure, examination of the left knee showed advanced chondromalacia, as well as subluxation. OWCP initially denied the claim; however, by decision dated September 22, 2009, it found that Dr. Schweitzer's reports were sufficient to create a *prima facie* case for entitlement to total disability compensation sufficient to warrant further development of the medical evidence.

The case was referred to Dr. Fisher, who opined that appellant still had residuals from her accepted aggravation of bilateral patellofemoral arthritis condition. In his initial report, dated October 27, 2009, he did not address whether she was disabled, OWCP requested a supplemental report. In his supplemental report dated December 9, 2009, Dr. Fisher stated that appellant could perform light duty with restrictions.

The Board finds that the medical evidence of record is in conflict as to whether appellant's accepted condition of aggravation of patellofemoral arthritis caused disability as of May 4, 2009. This case must therefore be remanded to an impartial medical specialist for an impartial medical examination to resolve the conflict.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103 of FECA<sup>11</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.<sup>12</sup> In interpreting this section of FECA, the Board has recognized that OWCP has

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<sup>10</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>11</sup> 5 U.S.C. § 8101 *et seq.*

<sup>12</sup> *Id.* at § 8103.

broad discretion in approving services provided under FECA. OWCP has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

OWCP accepted appellant's claim for aggravation of bilateral patellofemoral arthritis. On August 8, 2008 Dr. Schweitzer advised that she needed arthroscopic surgery for the hematoma, chronic pain and arthritis of her left knee. He stated on September 10, 2008 that appellant required arthroscopic surgery, with shaving and lateral release, to ameliorate the patellofemoral arthritis in her left knee. Dr. Schweitzer noted on September 24, 2008 that she was being treated conservatively with medication, activity limitation and knee bracing, while awaiting authorization for surgery. Finally, on May 27, 2009, he explained again that appellant was unable to work due to pain and swelling in her knee and leg caused by patellofemoral joint arthritis. Dr. Schweitzer advised that she was unable to take NSAIDs, which made nonsurgical treatment more problematic. He therefore reiterated that appellant required authorization for arthroscopic debridement and lateral release. Dr. Schweitzer performed the surgery on July 17, 2009.

OWCP denied authorization for the left knee surgery based on a second opinion from Dr. Fisher, who opined that appellant's left knee arthroscopy was not medically appropriate and necessary because Dr. Schweitzer had not prescribed sufficient conservative measures for six to eight weeks prior to surgery. Dr. Schweitzer cited general medical protocol for treating bilateral aggravation of patellofemoral arthritis to support his opinion. Based on his opinion, OWCP denied authorization for left knee arthroplasty. The Board finds that the medical evidence of record is therefore also in conflict as to whether appellant's left knee arthroplasty was medically necessary for treatment of the accepted injury and should have been authorized by OWCP. OWCP shall also request that the impartial medical examiner provide an opinion regarding this issue.

### **CONCLUSION**

The Board finds that a conflict exists in the medical evidence as to whether appellant has established that she was disabled as of May 4, 2009 due to her accepted left knee condition and whether her left knee surgery should be authorized. Upon return of the case record, OWCP shall further develop the medical evidence as appropriate and issue a *de novo* decision.

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<sup>13</sup> Daniel J. Perea, 42 ECAB 214 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 9, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: July 1, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board